

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

CAPITOL SPECIALTY INSURANCE
CORPORATION,

Plaintiff,

v.

THE BEACH EATERY & SURF BAR, LLC,
d/b/a JACK DIDLEY'S EATERY AND
CATERING; ERIC TODD JONES and
REBECCA JONES, husband and wife
and the marital community composed
thereof; BENJAMIN ADAM TRUDEAU and
JANE DOE TRUDEAU, husband and wife
and the marital community composed
thereof; MATTHEW THOMAS HIBBARD
and JANE DOE HIBBARD, husband and
wife and the marital community
composed thereof; MICHAEL V.
EISELE and JANE DOE EISELE,
husband and wife and the marital
community composed thereof;
MICHAEL D. CATES; and JOHN and
JANE DOES 1-5,

Defendants.

No. CV-13-05041-EFS

**ORDER GRANTING IN PART AND
DENYING IN PART PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT,
GRANTING IN PART AND DENYING IN
PART DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT, AND DENYING
PLAINTIFF'S MOTION TO STRIKE**

I. INTRODUCTION

Before the Court, without oral argument, is Plaintiff's Motion
for Summary Judgment Regarding Assault or Battery Exclusion, ECF No.
21; Defendants'¹ Cross-Motion for Summary Judgment, ECF No. 24; and
Plaintiff's Motion to Strike Certain Evidence Offered in Response and

¹ Note that this motion is joined by all defendants with the exception of
Michael D. Cates.

1 Cross-Motion to Plaintiff's Motion for Summary Judgment Regarding
2 Assault or Battery Exclusion and Memorandum of Authorities, ECF No.
3 33. Having reviewed the pleadings and the file in this matter, the
4 Court is fully informed. For the reasons that follow, the Court
5 partially grants Plaintiff's Motion for Summary Judgment finding that
6 the Assault or Battery Exclusion creates no duty to defend the
7 defamation claim in the underlying lawsuit, partially grants
8 Defendants' Cross-Motion for Summary Judgment finding an ambiguity as
9 to reasonable force, and denies Plaintiff's Motion to Strike.

10 **II. BACKGROUND**

11 **A. Factual History²**

12 The catalyst for the present case is an altercation between
13 Michael D. Cates and certain staff members of Jack Didley's Eatery &
14 Catering, a property operated by The Beach Eatery & Surf Bar, LLC
15 (hereafter referred to, in a term including its staff, as the "Beach
16 Eatery") in Kennewick, Washington on February 18-19, 2011. In that
17 case, Cates was a patron at Jack Didley's. Cates received several
18 injuries as a result of being ejected from the bar. Cates filed a
19 lawsuit (hereafter referred to as the "Cates lawsuit") in Benton
20 County Superior Court against Beach Eatery alleging assault, negligent
21 hiring and selection, negligent supervision, negligent training,

22
23 ² When considering the summary judgment motions and drafting this
24 background section, the Court 1) took as true all undisputed facts; 2)
25 viewed all evidence and drew all justifiable inferences therefrom in
26 non-moving party's favor; 3) did not weigh the evidence or assess
credibility; and 4) did not accept assertions made that were flatly
contradicted by the record. See *Scott v. Harris*, 550 U.S. 372, 380
(2007); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

1 negligent retention, intentional infliction of emotional distress,
2 defamation, negligence (excessive force), and respondeat superior.

3 At issue, in the factual context of this case, is the
4 interpretation of a commercial general liability insurance policy
5 executed between Capitol Insurance and Beach Eatery which was titled
6 Commercial General Liability Coverage Form and Liquor Liability
7 Coverage Form. Included in the insurance policy is a 4-part document
8 and endorsement titled "Assault or Battery Exclusion" which is meant
9 to modify both the Commercial General Liability Form and the Liquor
10 Liability Coverage Form. Sections A and B of the Assault or Battery
11 Exclusion exclude from insurance coverage under the policy certain
12 types of harm. Section A, which applies to the Commercial General
13 Liability Coverage Form, excludes from insurance coverage what it
14 defines as expected or intended "bodily harm" and "property damage."
15 Section B, which applies to the Liquor Liability Coverage Form,
16 excludes from insurance coverage what it defines as expected or
17 intended "injury." Section A states that "[t]his exclusion does not
18 apply to 'bodily injury' or 'property damage' resulting from the use
19 of reasonable force by any insured to protect persons or property."
20 Section B states that "[t]his exclusion does not apply to 'injury'
21 resulting from the use of reasonable force by any insured to protect
22 persons or property." Both Parts A and B except the use of reasonable
23 force from the Expected or Intended Injury policy exclusion, and thus
24 allow coverage for harm resulting from the use of reasonable force.
25 In other words, Parts A and B (hereafter referred to as the
26 "reasonable force provisions") disallow coverage for damage resulting

1 from expected or intended harm, but allow coverage when the resulting
2 harm is the product of reasonable force.

3 Part C, however, also titled "'Assault or Battery' Exclusion,"
4 rejects this idea in what will hereafter be referred to as the "no
5 force provision," stating that:

6 This insurance does not apply to, nor shall we have a duty
7 to defend, any claim or "suit" seeking damages or expenses
8 due to "bodily injury," "property damage," "personal and
9 advertising injury" or "injury", as defined respectively in
10 the Commercial General Liability Coverage Form and Liquor
11 Liability Coverage Form, arising out of, resulting from, or
12 in connection with any of the following acts or omissions
13 regardless of their sequence or any concurring cause:

14

15 e. The use of any force or property whether or not
16 the "bodily injury", "property damage", "personal
17 or advertising injury" or "injury" was committed
18 by or at the direction of you, any insured or any
19 person or legal entity;"

20 The reasonable force exceptions to the Assault and Battery Exclusion
21 in Parts A and B seem to conflict with Part C's provisions regarding
22 any force. While Parts A and B allow coverage for those who use
23 reasonable force, Part C seems to say that the use of any force
24 precludes insurance coverage. The question this court must answer is
25 which provision controls: the reasonable force provisions or the no
26 force provision. Concurrently, Defendants ask the Court to decide
that Plaintiff has a duty to defend Beach Eatery in the Cates lawsuit.

27 **B. Procedural History**

28 In Washington State, "[i]f the insurer is uncertain of its duty
29 to defend, it may defend under a reservation of rights and seek a
30 declaratory judgment that it has no duty to defend." *Woo v. Fireman's*
31 *Fund Ins. Co.*, 161 Wn.2d 43, 54 (Wash. 2007). Plaintiff followed this

1 protocol by sending a Reservation of Rights Letter dated March 25,
2 2013, to Beach Eatery, and filing this declaratory action to determine
3 if Plaintiff has a duty to defend Beach Eatery in the Cates lawsuit.

4 Plaintiff filed its Motion for Summary Judgment Regarding
5 Assault or Battery Exclusion, claiming that the Assault or Battery
6 Exclusion in the insurance policy, namely Part C subsection (e) on the
7 use of any force, precludes insurance coverage for the defendants in
8 the Cates lawsuit, as it is uncontested that there was the use of at
9 least some force in that altercation. ECF No. 21 at 9. Plaintiff
10 cites *McAllister v. Algora Syndicate, Inc.*, 103 Wn. App. 106, 111
11 (2000), which says that if there is an assault or battery exclusion
12 and there are claims "ultimately based on assault and battery in the
13 sense that without first establishing the underlying assault,
14 negligence cannot be proved," the exclusion denies coverage for those
15 claims that while not actually titled "assault" or "battery," are
16 claims that are not possible unless there is the assault or battery to
17 begin with. ECF No. 21 at 10-12.

18 Defendants in their response to Plaintiff's Motion for Summary
19 Judgment, and in filing their own Cross-Motion for Summary Judgment,
20 argue that the no force provision does not apply to the reasonable
21 force provisions, or in the alternative, that the entire Assault or
22 Battery Exclusion is ambiguous due to a conflict between the no force
23 provision and the reasonable force provisions. ECF No. 24 at 6-8, 11,
24 14-15. Washington insurance law states that "[t]he duty to defend
25 arises where the complaint against the insured, construed liberally,
26 alleges facts which could, if proven, impose liability upon the

1 insured within the policy's coverage." *Am. Best Food, Inc. v. Alea*
2 *London, Ltd.*, 168 Wn.2d 398, 404-05 (2010). Defendants point out that
3 Washington law states that doubts and ambiguities are read in favor of
4 insurance coverage. *Id.* at 411; ECF No. 24 at 10. Defendants argue
5 that Plaintiff owes them a duty to defend, asserting that there is at
6 least an ambiguity in the Assault or Battery Exclusion with
7 conflicting terms directly controlling whether or not a duty to defend
8 in the Cates lawsuit exists. ECF No. 24 at 6-8, 11, 14-15.

9 Plaintiff also moves to strike certain testimony by Matthew
10 Hibbard, General Manager of Jack Didley's, whose staff allegedly
11 assaulted Cates in the underlying lawsuit. ECF No. 33. This
12 testimony is contained in what is hereafter called the "Hibbard
13 Declaration." ECF No. 28; ECF No. 33 at 3. The Hibbard Declaration
14 is a Post-Incident Report that Hibbard wrote regarding the February
15 18-19, 2011 altercation between Cates and the staff of the Beach
16 Eatery. ECF No. 28. The report shows Hibbard's recollection of what
17 happened during that altercation, which appears to show that the Beach
18 Eatery's staff exercised reasonable force towards Cates. *Id.*
19 Defendants rely on the Hibbard Declaration to further their argument
20 that they exercised reasonable force. ECF No. 24 at 12. Plaintiff
21 argues that this testimony should be stricken under Federal Rules of
22 Evidence 401, 402, and 403, because the testimony is irrelevant to the
23 case before this Court, as the testimony does not answer the question
24 of whether Cates' claims are covered under the policy. ECF No. 33 at
25 3.

26 //

1 **III. PARTIES' MOTIONS FOR SUMMARY JUDGMENT**

2 **A. Legal Standard for Summary Judgment**

3 Summary judgment is appropriate if the record establishes "no
4 genuine dispute as to any material fact and the movant is entitled to
5 judgment as a matter of law." Fed. R. Civ. P. 56(a). The party
6 opposing summary judgment must point to specific facts establishing a
7 genuine dispute of material fact for trial. *Celotex Corp. v. Catrett*,
8 477 U.S. 317, 324 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio*
9 *Corp.*, 475 U.S. 574, 586-87 (1986). If the non-moving party fails to
10 make such a showing for any of the elements essential to its claim for
11 which it bears the burden of proof, the trial court should grant the
12 summary judgment motion. *Celotex Corp.*, 477 U.S. at 322.

13 **B. Legal Standard for Interpreting Insurance Policies**

14 The construction of an insurance contract is a question of law.
15 *State Farm Gen. Ins. Co. v. Emerson*, 102 Wn.2d 477, 480 (1984);
16 *Bordeaux, Inc. v. Am. Safety Ins. Co.*, 145 Wn. App. 687, 694 (2008).
17 Courts construe insurance policies as contracts. *Quadrant Corp. v.*
18 *American States Ins. Co.*, 154 Wn.2d 165, 171 (2005). We consider the
19 policy as a whole and give it a "'fair, reasonable, and sensible
20 construction as would be given to the contract by the average person
21 purchasing insurance.'" *Weyerhaeuser Co. v. Commercial Union Ins.*
22 *Co.*, 15 P.3d 115, 122 (Wash. 2000) (quoting *Am. Nat'l Fire Ins. Co. v.*
23 *B & L Trucking & Constr. Co.*, 134 Wn.2d 413, 427-28 (1998)). "The
24 language in standard form policies is interpreted in accord with the
25 understanding of the average purchaser even if the insured is a large
26 corporation with company counsel." *Queen City Farms, Inc. v. Central*

1 *Nat'l Ins. Co. of Omaha*, 126 Wn.2d 50, 66 (1994) (quoting *Boeing Co.*
 2 *v. Aetna Cas. & Sur. Co.*, 113 Wn.2d 869, 882-83 (1990)). "[I]f the
 3 policy language is clear and unambiguous," the court "must enforce it
 4 as written;" the court "may not modify it or create ambiguity where
 5 none exists." *Quadrant*, 154 Wn.2d at 171 (2005). A policy is
 6 ambiguous only if its provisions are susceptible to two different
 7 interpretations, both of which are reasonable. *Allstate Ins. Co. v.*
 8 *Peasley*, 131 Wn.2d 420, 424 (1997). Courts resolve ambiguity in favor
 9 of the insured. *Moeller v. Farmers Ins. Co. of Wash.*, 173 Wn.2d 264,
 10 272 (2011). "Courts interpreting insurance policies should be bound
 11 by definitions provided therein." *Overton v. Consolidated Ins. Co.*,
 12 145 Wn.2d 417, 427 (2002).

13 **C. Analysis**

14 1. The Insurance Policy Is Ambiguous, and Thus, Reasonable 15 Force Is an Exception to the Expected Or Intended Injury 16 Exclusion

17 "The first step in interpreting an insurance contract is to
 18 determine if the policy language is ambiguous." *Alaska Nat'l Ins. Co.*
 19 *v. Bryan*, 125 Wn. App. 24, 30 (2004). This court finds the document
 20 to be ambiguous after comparing the reasonable force provisions of
 21 Parts A and B to the no force provision of Part C. The reasonable
 22 force provisions in Parts A and B conflict directly with the no force
 23 provision in Part C. While Parts A and B allow reasonable force to be
 24 an exception to the Expected Or Intended Injury Exclusion, thus
 25 providing coverage where reasonable force was used, Part C disallows
 26 coverage in all circumstances where any force was used. Furthermore,

1 the no force provision and the reasonable force provisions are in the
2 same short three-page endorsement, with the reasonable force
3 provisions on the page immediately preceding that of the no force
4 provision, which does not refer in any way to the reasonable force
5 provisions. The insurance policy is thus capable of two reasonable
6 and different interpretations in the factual context of the Cates
7 lawsuit alleging assault brought about by Beach Eatery. *See Allstate*,
8 131 Wn.2d at 424. One interpretation is that the use of any force by
9 the insured completely blocks insurance coverage. A second
10 interpretation is that the insured is guaranteed insurance coverage if
11 the insured exercises reasonable force. As it is impossible to
12 reconcile these two provisions in a way that makes sense and avoids
13 ambiguity, the Court must follow contract law to interpret the
14 insurance policy and the endorsement. *Quadrant*, 154 Wn.2d at 171.

15 The court may decide this issue on summary judgment, as
16 interpretation of an insurance contract is a question of law. *State*
17 *Farm*, 102 Wn.2d at 480. Insurance contracts are of a different
18 character from regular contracts though, in that they are construed in
19 favor of coverage. *Moeller*, 173 Wn.2d at 272. Even more important is
20 the rule that "exclusionary clauses are to be most strictly construed
21 against the insurer." *Phil Schroeder, Inc. v. Royal Globe Ins. Co.*,
22 99 Wn.2d 65, 68 (1983). The endorsement at issue in this case is such
23 an exclusion, and as there are two different but reasonable
24 interpretations present in the exclusion, the Court must construe it
25 in favor of the insured, and give effect to the provision which allows
26 coverage. *Moeller*, 173 Wn.2d at 272. Thus, the Court rules that the

1 reasonable force provisions apply over the no force provision.

2 Additionally, Plaintiff relies upon *Montpelier U.S. Insurance*
3 *Co. v. Boku L.L.C.*, No. 12–CV–01457, 2014 WL 1246767 (D. Conn. Mar.
4 24, 2014), asserting that reasonable force language in an Expected or
5 Intended Injury Exclusion does not conflict with an Assault or Battery
6 Exclusion. However, it is important to note that the provisions at
7 issue here appear in an endorsement titled "Assault or Battery
8 Exclusion," which in turn modifies documents purporting to insure
9 Defendants in documents titled "Commercial General Liability Coverage
10 Form" and "Liquor Liability Coverage Form." ECF No. 1-1 at 69–71. As
11 this court must interpret the insurance contract through the eyes of
12 an average insurance purchaser, it is unlikely that an average
13 insurance purchaser would know that in agreeing to an endorsement and
14 modification titled "Assault or Battery Exclusion," that they are not
15 only agreeing not to be insured for assault and battery, but to also
16 not be insured when *any* force is used. See *Woo*, 161 Wn.2d at 52.
17 Upon reading the reasonable force provisions, average purchasers would
18 immediately believe that they are still covered under circumstances
19 where the insured exerts reasonable force, because it says exactly
20 that on the first page of the endorsement in plain language. See *id.*
21 The absence of any language in the no force provision which even hints
22 at modifying the reasonable force provisions creates in the average
23 insurance purchaser an expectation of insurance coverage in cases
24 where reasonable force was exercised. See *Weyerhaeuser*, 15 P.3d at
25 122. Accordingly, this court finds that the no force provision does
26 not apply where the expected or intended damages resulted from the use

1 of reasonable force as set forth in the Assault or Battery Exclusion.

2 2. Plaintiff Cannot Rely on the Assault or Battery Exclusion
3 to Avoid Defending Beach Eatery from Cates' Assault Claim

4 Having found that the insurance policy is ambiguous and that the
5 reasonable force provision applies when in conflict with the no force
6 provision, the court must next determine if it is conceivable that the
7 complaint in the Cates lawsuit alleges facts covered under the
8 insurance policy. See *Woo*, 161 Wn.2d at 56.

9 Washington law requires that the duty to defend be analyzed in
10 accordance with the allegations in the complaint in the underlying
11 lawsuit. See *Nat'l Sur. Corp. v. Immunex Corp.*, 176 Wn.2d 872, 879
12 (2013). "[T]he duty to defend 'arises when a complaint against the
13 insured, construed liberally, alleges facts which could, if proven,
14 impose liability upon the insured within the policy's coverage.'" *Id.*
15 (emphasis added) (citations omitted). "The duty to defend . . .
16 is based on the *potential for liability*." *Woo*, 161 Wn.2d at 52
17 (emphasis in original). And "[a]n insurer is not relieved of its duty
18 to defend unless the claim alleged in the complaint is 'clearly not
19 covered by the policy.'" *Id.* at 53. "[T]he duty to defend is
20 triggered if the insurance policy conceivably covers the allegations
21 in the [underlying] complaint" *Id.* "Conceivably" is a very
22 low threshold, and one that is quite easy to reach.

23 Here, while the complaint does not allege that Defendants used
24 reasonable force in the altercation with Cates, an allegation that
25 would clearly trigger the duty to defend, it must be remembered that
26 the Court must liberally interpret the complaint when analyzing

1 whether there is a contractual duty to defend. *Nat'l Sur. Corp.*, 176
2 Wn.2d at 879.

3 Plaintiff argues that if the reasonable force provision applies,
4 then every insured defendant alleged to have assaulted someone will
5 claim that they used reasonable force, and thus will be insured as a
6 result, leading to an absurd result providing coverage for those who
7 were intended to be excluded from coverage via the Assault or Battery
8 Exclusion. ECF No. 31 at 9. However, this is exactly what is
9 required under the wording of the entire insurance policy (with all
10 modifications including the Assault or Battery Exclusion), as
11 construed under Washington insurance law. Under the principles which
12 animate this field of law, not the least of which is that insurance
13 policies are to be construed in favor of coverage when there are
14 different but reasonable interpretations, this ruling is driven by the
15 language of the policy before this court. *Moeller*, 173 Wn.2d at 272.

16 As noted, an insurer is relieved of its duty to defend only if
17 the underlying complaint is clearly not covered by the policy. *Woo*,
18 161 Wn.2d at 53. However, there is no such clarity in this case. The
19 Commercial General Liability Coverage Form states that the insurer is
20 obligated to cover damages for "bodily injury" or "property damage."
21 ECF No. 1-1 at 41. The Liquor Liability Coverage Form states that the
22 insurer is obligated to cover injuries sustained by "selling, serving
23 or furnishing of any alcoholic beverage." ECF No. 1-1 at 75. Both of
24 these provisions are modified by certain exclusions and modifications.
25 The closest modification that applies as to the alleged assault is the
26 no force provision, but this Court has already ruled that the

1 reasonable force provisions prevail. The Cates complaint lists
2 several causes of action all stemming from the injuries Cates received
3 in the incident with Beach Eatery's employees. One of Cates' claims
4 is assault: he alleges that he "was physically assaulted and pushed
5 into the street onto his back." ECF No. 1-2 at 4. Conceivably, this
6 was the "result[] from the use of reasonable force . . . to protect
7 persons or property." ECF No. 1-2 at 69. In accordance with these
8 facts and principles, the Court finds that it is at least *conceivable*
9 that the complaint alleges facts which *could* make the complaint fall
10 within the policy's coverage. In other words, it is conceivable that
11 the expected or intended force Beach Eatery's security staff used
12 against Cates as alleged in the underlying lawsuit was reasonable, and
13 thus within the policy's coverage. Thus, Plaintiff cannot avoid its
14 duty to defend Defendants on the assault allegation in the underlying
15 Cates lawsuit by relying upon the no force provision.

16 3. Plaintiff Does Not Have a Duty to Defend Defendants'
17 Alleged Defamation

18 Defendants argue that Cates' defamation claim invokes
19 Plaintiff's duty to defend. ECF No. 24 at 17-21. They cite *American*
20 *Best Food, Inc. v. Alea London, Inc.*, 168 Wn.2d 398 (2010) to support
21 their position. In that case, two patrons of a nightclub started a
22 fight with each other. *Id.* at 402-04. Just outside the nightclub,
23 one of the patrons (Antonio) shot the other (Dorsey). *Id.* Security
24 returned fire, and wounded Antonio. *Id.* Security dragged Dorsey
25 inside. *Id.* Security was then ordered to remove him and did so,
26 leaving him by the curb of the street. *Id.* Dorsey sued the

1 nightclub, alleging that it "failed to take reasonable precautions to
2 protect him against criminal conduct despite considerable notice of
3 the potential harm[,] " and that "the security guards exacerbated his
4 injuries by dumping him on the sidewalk after he was shot." *Id.* The
5 nightclub "sought protection from its insurer, Alea London, Ltd." *Id.*
6 Alea denied its duty to defend on the ground that the insurance policy
7 it had with the nightclub had an exclusion which excluded insurance
8 coverage "for injuries or damages 'arising out of' assault or
9 battery." *Id.* The Alea Court, in reviewing the assault and battery
10 exclusion before it, recognized that claims that an insured acted
11 negligently after an excluded event can be covered. *Id.* at 410-11.

12 Here, Defendants argue that Alea applies because the defamation
13 occurred after the alleged assault and was "independent enough to
14 warrant a defense[,] " and thus, Alea's holding dictates that Capitol
15 has a duty to defend. ECF No. 24 at 19 (citing Alea, 168 Wn.2d at
16 408). However, this argument fails to note that the exclusion in Alea
17 was significantly different from the one here. The exclusion in Alea
18 stated that "[t]his insurance does not apply to any claim *arising out*
19 *of . . . [r]eporting to the proper authorities or failure to so report*
20 *. . . .*" Alea, 168 Wn.2d at 696 (emphasis added). However, the
21 exclusion in this case (hereafter referred to as the "reporting
22 provision") disclaims any coverage for "'bodily injury,' 'property
23 damage, 'personal and advertising injury' or 'injury' . . . *arising*
24 *out of, resulting from, or in connection with . . . regardless of*
25 *their sequence or any concurring cause . . . [t]he reporting to the*
26 *proper authorities or failure to do so by you, any insured, or any*

1 person or legal entity" ECF No. 1-1 at 70 (emphasis added).
2 Unlike the exclusion in *Alea*, the exclusion in this case is much
3 broader and is not limited by time. Even if the defamation claim
4 might not fit under the category of harm arising out of reporting to
5 the proper authorities, it surely fits into the category of harm in
6 connection with the reporting to the proper authorities regardless of
7 its sequence to the underlying alleged assault. While the Court must
8 construe ambiguities in favor of the insured, it cannot construe it in
9 favor of coverage where it clearly is not covered by the policy. See
10 *Moeller*, 173 Wn.2d 264, 272 (2011) (stating that ambiguities in
11 insurance policies are to be read in favor of coverage); *Quadrant*
12 *Corp.*, 154 Wn.2d at 171 (stating that the court "may not modify" an
13 insurance policy "or create ambiguity where none exists."); *Allstate*
14 *Ins. Co.*, 131 Wn.2d at 424 ("An ambiguity exists only if the language
15 on its face is fairly susceptible to two different but reasonable
16 interpretations." (emphasis in original) (internal quotations and
17 citations omitted). In other words, the Court cannot construe an
18 ambiguity where the wording in question lacks ambiguity. The policy,
19 as to defamation, definitively and expressly lacks such ambiguity, and
20 thus the common law interpretation of insurance law has no effect in
21 this regard. Unlike the argument concerning the conflict between the
22 reasonable force provisions and the no force provision, Defendants
23 have not pointed to any provision which would provide any basis to
24 create at least an ambiguity that can be construed in their favor.

25 Defendants argue that the use of reasonable force created the
26 defamation claim. ECF No. 24 at 13. Thus, the same analysis which

1 applies to the other claims applies to the defamation claim, namely
 2 that the reasonable force provision applies over the no force
 3 provisions, and thus Plaintiff has a duty to defend Defendants against
 4 the defamation claim. *Id.* However, this argument fails to consider
 5 the exact wording of the reasonable force provisions, the nature of a
 6 defamation claim, and the presence of the reporting provision. The
 7 reasonable force provisions apply only to "bodily injury"³ or
 8 "property damage"⁴ in the Commercial General Liability Coverage Form,
 9 and to "injury"⁵ in the Liquor Liability Coverage Form. ECF No. 1-1
 10 at 69. The harm referred to in the reasonable force provisions is

11 ³ The Commercial General Liability Coverage Form defines "bodily injury" as
 12 "bodily injury, sickness or disease sustained by a person, including death
 resulting from any of these at any time." ECF No. 1-1 at 53.

13 ⁴ The Commercial General Liability Coverage Form defines the following terms:

14 13. "Occurrence" means an accident, including continuous or repeated
 exposure to substantially the same general harmful conditions.

15

16 17. "Property damage" means:

17 a. Physical injury to tangible property, including all resulting
 loss of use of that property. All such loss of use shall be
 18 deemed to occur at the time of the physical injury that caused
 it; or

19 b. Loss of use of tangible property that is not physically injured.
 All such loss of use shall be deemed to occur at the time of the
 "occurrence" that caused it.

ECF No. 1-1 at 54-55.

20 ⁵ The Liquor Liability Coverage Form defines the following terms:

21 1. "Bodily Injury" means bodily injury, sickness or disease sustained
 by a person, including death resulting from any of these at any
 time.

22

23 5. "Injury" means damages because of "bodily injury" and "property
 damage", including damages for care, loss of services or loss of
 support.

24

25 7. "Property damage" means:

26 a. Physical injury to tangible property, including all resulting
 loss of use of that property. All such loss of use shall be
 deemed to occur at the time of the physical injury that caused
 it; or

b. Loss of use of tangible property that is not physically injured.
 All such loss of use shall be deemed to occur at the time of the
 occurrence that caused it.

ECF No. 1-1 at 79.

1 only physical harm to persons or property. *Id.* at 53, 55, 69, 79.
2 Defamation requires that the injured party prove "(1) falsity, (2) an
3 unprivileged communication, (3) fault, and (4) damages." *Grange Ins.*
4 *Ass'n v. Roberts*, 320 P.3d 77, 93 (Wn. App. 2013). None of these
5 elements relate to physical harm; defamation is based on damage to
6 reputation. ECF No. 24 at 18; see generally *Grange Ins. Ass'n*, 320
7 P.3d at 93 (listing the elements of defamation). As the reasonable
8 force provisions do not address the type of harm defamation causes,
9 and as the reporting provision directly addresses such a defamation
10 claim as in this type of case, there is not even an ambiguity that can
11 be construed in favor of coverage. Thus, Plaintiff does not have a
12 duty to defend Defendants on the defamation claim.

13 Both parties raise arguments based on *McAllister v. Agora*
14 *Syndicate, Inc.*, 103 Wn. App. 106 (2000). However, as it is clear
15 upon other grounds that Plaintiff owes no duty to defend on the
16 defamation claim, this court need not address this issue.

17 **IV. PLAINTIFF'S MOTION TO STRIKE EVIDENCE**

18 The Federal Rules of Evidence has certain standards regarding
19 the admissibility of evidence. Evidence must be relevant to be
20 admissible; "[i]rrelevant evidence is not admissible." Fed. R. Evid.
21 402. And "[e]vidence is relevant if: (a) it has a tendency to make a
22 fact more or less probable than it would be without the evidence; and
23 (b) the fact is of consequence in determining the action." Fed. R.
24 Evid. 401. "Relevance is typically a low bar to the admissibility of
25 evidence," and is thus a low threshold to pass. *Jones v. Ford Motor*
26 *Co.*, 204 Fed. Appx. 280, 283 (4th Cir. 2006). "The court may exclude

1 relevant evidence if its probative value is substantially outweighed
2 by a danger of one or more of the following: unfair prejudice,
3 confusing the issues, misleading the jury, undue delay, wasting time,
4 or needlessly presenting cumulative evidence." Fed. R. Evid. 403.

5 Plaintiff argues that the Hibbard Declaration, ECF No. 28,
6 includes statements regarding what Hibbard states was reasonable
7 force. ECF No. 33 at 3. Plaintiff argues that such statements, while
8 relevant to the outcome of the Cates lawsuit, are irrelevant before
9 this Court because Cates' complaint did not allege reasonable force,
10 and the duty to defend is determined by the injured's complaint and
11 not the insured's answer and defenses. *Id.* at 3-4. Thus, Plaintiff
12 argues that the Hibbard Declaration's statements about reasonable
13 force should be stricken. *Id.*

14 The Court finds the contested statements in the Hibbard
15 Declaration, ECF No. 28, to be admissible and relevant evidence to
16 this case. These statements are relevant for the determination of
17 coverage. This evidence applies directly to the determination of
18 whether reasonable force was used, and thus applies to the
19 determination of whether there was a duty to defend those claims which
20 are covered under the reasonable force provisions of the Assault or
21 Battery Exclusion. Even though not necessarily dispositive of the
22 issue, it at least raises a conceivable basis for coverage, thus
23 triggering the insurer's duty to defend. See *Woo*, 161 Wn.2d at 53.
24 Plaintiff's motion to strike is denied. The pertinent statements in
25 the Hibbard Declaration are relevant to this case.

26 //

V. CONCLUSION

In conclusion, the Court finds an ambiguity in the terms of the insurance policy, in which it is reasonable for the insured to believe coverage was available for damage resulting from the use of reasonable force in protecting persons or property. Therefore, as there is a factual basis in the Cates complaint that this occurrence conceivably resulted from reasonable force, Plaintiff cannot avoid its duty to defend the assault claim by relying upon the Assault or Battery Exclusion. However, Plaintiff owes no duty to defend the defamation claim. While Defendants' cross-motion vaguely seeks a finding of a duty to defend, to the extent this would require an analysis of the remaining Cates claims of negligence and whether they would fall within the reasonable force exception to the Expected and Intended Injury Exclusion or within a provision of the Assault and Battery Exclusion, in the absence of briefing on point, the Court declines to so inquire at this time. And as there is an ambiguity in the insurance policy which makes reasonable force a basis for coverage, and as Defendants claim that they exercised reasonable force in the altercation which is the subject of the underlying lawsuit, the Hibbard Declaration's contested statements are relevant, and thus Plaintiff's Motion to Strike is denied.

Accordingly, **IT IS HEREBY ORDERED:**

1. Plaintiff's Motion for Summary Judgment, **ECF No. 21**, is **GRANTED IN PART** (no duty to defend as to defamation) and **DENIED IN PART** (remainder).

2. Defendants' Cross-Motion for Summary Judgment, **ECF No. 24**,

1 is **GRANTED IN PART** (ambiguity as to the use of force) and
2 **DENIED IN PART** (remainder).

3 3. Plaintiff's Motion to Strike, **ECF No. 33**, is **DENIED**.

4 **IT IS SO ORDERED.** The Clerk's Office is directed to enter this
5 Order and provide copies to all counsel.

6 **DATED** this 30th day of July 2014.

7
8 s/Edward F. Shea
9 EDWARD F. SHEA
10 Senior United States District Judge
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